FILE COPY

Office - Supreme Court, U. S.
FILED
MAR 3 1938
CHARLES ELMORE CROPLEY
CLERK

No. 647

In the Supreme Court of the United States

OCTOBER TERM, 1937

BATES MANUFACTURING COMPANY

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

CHARLES B. RUGG
H. BRIAN HOLLAND
WARREN F. FAER
EVERETT H. MACOY
Counsel for Petitioner

ROPES, GRAY, BOYDEN & PERKINS,
Of counsel.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statutes Involved	2
Statement	2
Specification of Errors to Be Urged	3
Summary of Argument	4
Argument	7
I. Applying the established rules of statutory interpretation, a suit under the Tucker Act is "begun" when the petition is filed in the district court	7
A. Taking the words of the statutes in their ordinary sense, the filing of the petition is the beginning of the suit	9
B. The judicially sanctioned meaning of the word "begun", as applied to the commencement of actions, further shows that a suit under the Tucker Act is begun when the petition is filed	11
C. The statutory history of the provisions in question further indicates that the filing of the petition under the Tucker Act is the beginning of the suit	17
II. The fact that the statutes here involved relate to suits against the government does not justify the interpretation placed upon them by the court below	22

PAGE

III. The authorities cited by the court below and others commonly relied on in support of the government's contention are neither weighty nor persuasive 28

Conclusion 32

Appendix 33

Citations

Cases:

Anderson v. *Aetna Life Ins. Co.*, 75 N. H. 375.... 14

Armstrong Cork Co. v. *Merchants' Refrigerating Co.*, 184 Fed. 199 16

Bachmann, Emmerich & Co., Inc. v. *United States*, 1935 C.C.H. Fed. Tax Service, Vol. 3-A, par. 9427 ..... 28, 29

Bank of the United States v. *Lyles*, 10 Gill & J. (Md.) 326 13

Beardmore v. *Rattenbury*, 5 Barn. & Ald. 452.... 12

Brown v. *Babbington*, 2 Ld. Raymond 880..... 12

Burdick v. *Green*, 18 Johns. (N. Y.) 14..... 14

Burton v. *Buckeye Insurance Co.*, 26 Ohio St. 467 9

Cassarello v. *United States*, 265 Fed. 326..... 30, 31

Chapman v. *Goodrich*, 55 Vt. 354 14

Chase v. *United States*, 155 U. S. 489..... 19, 20

Cinotta v. *Dupuy*, Mass. Adv. Sh. (1936) 991, 1 N. E. (2d) 182 14

City of Philadelphia v. *The Collector*, 5 Wall. 720 18

Collector v. *Hubbard*, 12 Wall. 1 18

Coppin v. *Gray*, 1 Y. & C. 205 15

Creasy v. *United States*, 4 F. Supp. 175..... 28, 29

Day v. *Lamb*, 7 Vt. 426 14

Duran v. *United States*, 31 C. Cls. 353..... 15

PAGE

Elliott v. *Swartwout*, 10 Peters 137 18

Equitable Life Assurance Society v. *Schwartz*, 42 F. (2d) 646 16

Farbwerke Vormals Meister Lucius & Brüning v. *Diarsenal Co.*, 21 F. (2nd) 588 16

Farmers' Loan & Trust Co. v. *Lake Street Elevated Railroad Co.*, 177 U. S. 51 16

Fritch, J. Homer, Inc., v. *United States*, 248 U. S. 458 20

Gardner v. *Webber*, 17 Pick. (Mass.) 407 14

Gibson v. *Pittsburgh Transportation Co.*, 311 Pa. 312 13

Goldenberg v. *Murphy*, 108 U. S. 162 11

Griffin's Case, 13 C. Cls. 257 26

Hail v. *Spencer*, 1 R. I. 17 ..... 12, 13, 14

Haughton & Booth v. *Leary*, 20 N. C. 21 14

Henry v. *United States*, 15 F. Supp. 651 31

Hostetter v. *United States*, 1937 C.C.H. Fed. Tax Service, Vol. 4, par. 9436 26

Humane Bit Co. v. *Barnet*, 117 Fed. 316 16

Irving Trust Co. v. *United States*, 1935 C.C.H. Fed. Tax Service, Vol. 3-A, par. 9600 26

Jincey v. *Winfield's Adm'r.*, 9 Gratt. (Va.) 708 .. 14

Johnson v. *Farwell*, 7 Greenleaf (Me.) 370 ..... 12, 14

Johnson v. *Smith*, 2 Burr. 950 12

Jones v. *United States*, 1936 C.C.H. Fed. Tax Service, Vol. 4, par. 9072 26

Kepner v. *United States*, 195 U. S. 100 11

Lawrence v. *Winifrede Coal Co.*, 48 W. Va. 139 .. 13

Linn & Lane Timber Co. v. *United States*, 236 U. S. 574 16

Little v. *United States*, 54 F. (2d) 711 26

Lynch v. *Alworth-Stevens Co.*, 267 U. S. 364 9

PAGE

Mason v. *Cheney*, 47 N. H. 24 14
Miller v. *United States*, 11 F. Supp. 924 31
Moore (George) Ice Cream Co, v. *Rose*, 289 U. S. 373 ..... 18, 24
Mound City Co. v. *Castleman*, 187 Fed. 921 15
Munro v. *United States*, 89 F. (2d) 614 ..... 25, 31
Mutual Savings Fund Harmonia v. *Gunne*, 110 N. J. L. 41 14

National Casket Co. v. *United States*, 263 Fed. 246 30, 31

Parsons v. *King*, 7 Term Rep. 6 12
Pierce v. *Tiernan*, 280 Mass. 180 14
Purcell v. *Blennerhasset*, 3 Jo. & Lat. 24 15

Randall v. *Bacon*, 49 Vt. 20 12
Reid v. *United States*, 211 U. S. 529 20
Reid Wrecking Co. v. *United States*, 202 Fed. 314 30, 31
Roosevelt v. *Missouri State Life Ins. Co.*, 70 F. (2d) 939 16

Society for Propagating the Gospel v. *Whitcomb*, 2 N. H. 227 ..... 12, 14
Spencer v. *United States*, 14 F. Supp. 46 ..... 8, 31

United States v. *Adams*, 92 F. (2d) 395 16
United States v. *American Lumber Co.*, 85 Fed. 827 16
United States v. *Chase Securities Corp.*, 24 F. (2d) 500 26
United States v. *Davis*, 131 U. S. 36 20
United States v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269 24
United States v. *Greathouse*, 166 U. S. 601 21
United States v. *Hardy*, 74 F. (2d) 841 16
United States v. *Hvoslef*, 237 U. S. 1 26
United States v. *Jones*, 131 U. S. 1 20
United States v. *Kaufman*, 96 U. S. 567 18

PAGE

United States v. *Miller*, 164 Fed. 444..... 16
United States v. *Northern Finance Corp*, 16 F. (2d) 998 ..... 14, 16
United States v. *Sanges*, 144 U. S. 310..... 11
United States v. *Savings Bank*, 104 U. S. 728..... 18
Vincent v. *McElvain*, 304 Ill. 160..... 27
Walton v. *United States*, 73 F. (2d) 15..... 8, 23, 28
Wilhelm v. *United States*, 18 F. Supp. 600..... 26
Woolford Realty Co. v. *Rose*, 286 U. S. 319..... 9

Statutes:

Act of March 3, 1887, c. 359, 24 Stat. 505 (Tucker Act):
§1 ..... 19, 20, 21, 35, 37
§2 ..... 8, 20, 21, 36, 38
§4 36
§5 (U. S. C., Title 28, §762)..... 2, 3, 5, 8, 9, 10, 17, 22, 23, 24, 29, 30, 32, 36, 39
§6 (U. S. C., Title 28, §763)..... 3, 5, 6, 8, 9, 10, 17, 22, 23, 24, 25, 27, 29, 32, 37, 39
Act of March 3, 1911, c. 231, 36 Stat. (Judicial Code):
§24 (20) (U. S. C. Title 28, §41 (20))..8, 21, 26, 38
§145 (U. S. C. Title 28, §250)..... 37
§156 (U. S. C. Title 28, §262)..... 20, 37
§159 (U. S. C. Title 28, §265)..... 37
§297 ..... 37, 38

Revised Statutes:
§643 18
§1059 ..... 33, 37
§1060 34

PAGE

§1069 ..... 19, 34, 37

§1072 ..... 19, 34, 37

§3226, as amended by §1113 (a) of the Revenue Act of 1926 ..... 2, 3, 4, 5, 7, 8, 9, 11, 17, 18, 19, 22, 23, 26, 39

§3227 ..... 18, 19, 22

Miscellaneous:

Equity Rules 12, 13, and 15 16

Webster's New International Dictionary (2d Ed.) 9

Wood, *Limitations* (4th Ed.) §289 12

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 647

BATES MANUFACTURING COMPANY, Petitioner

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court (R. 9-12) is reported in 19 F. Supp. 526. The opinion of the Circuit Court of Appeals (R. 16-22) is reported in 93 F. (2d) 721.

JURISDICTION

The judgment of the Court below was entered December 8, 1937 (R. 25). The petition for a writ of certiorari was filed on December 24, 1937 (R. 26) and was granted on January 31, 1938 (R. 25). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an action against the United States in the District Court to recover taxes illegally collected is "begun" within the meaning of Section 3226 of the Revised Statutes, as amended, when a petition is filed in the District Court under Section 5 of the Tucker Act.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 33-40.

STATEMENT

The Government moved to dismiss a petition filed by the plaintiff in the District Court. The material facts set forth in said petition, which must be considered as admitted by the Motion to Dismiss, together with other relevant facts of record, may be summarized as follows:

The plaintiff filed within the applicable period of limitation claims for the refund of income, excess profits and war profits taxes paid by it for the calendar years 1917 to 1921, inclusive, and alleged to have been erroneously and illegally assessed and collected (R. 1, 2, 5). All of said refund claims were rejected by the Commissioner of Internal Revenue on March 22, 1927 (R. 1, 5). On March 21, 1929, one day prior to the expiration of the period for bringing suit, the plaintiff filed in the office of the Clerk of the District Court of the United States for the District of Massachusetts a duly verified petition seeking judgment against the United States for the refund of $313,349.71, being a portion of the taxes referred to in said claims for refund (R. 1-6, 14). A copy of the petition was served by counsel for the plaintiff on the United States Attorney for the District of Massachusetts on March 25, 1929, and on the same day a copy of the petition and notice of its filing were sent by registered mail to the Attorney General of the United States (R. 6-7). On March 28, 1929, counsel for the plaintiff filed in the office of the Clerk of the District Court an affidavit of the

service and mailing of the petition and notice as above set forth (R. 6, 14).

On May 16, 1929, the United States Attorney filed a general denial on behalf of the Government (R. 7, 14). On May 4, 1937, the United States Attorney filed a motion to dismiss the petition on the ground that the cause of action was barred by the provisions of Section 3226 of the Revised Statutes, as amended by Section 1113 (a) of the Revenue Act of 1926 (R. 8, 15).

The District Court granted the Government's motion, holding that an action against the United States is not begun at least until a copy of the petition filed under Section 5 of the Tucker Act (*infra*, p. 36) has been served upon the United States Attorney in accordance with Section 6 of that Act (*infra*, p. 37) and that inasmuch as such service had not been effected in the instant case prior to the expiration of the period of limitation the action was barred and the Court was without jurisdiction to entertain the suit (R. 9-12). The Circuit Court of Appeals affirmed the judgment of the District Court (R. 16-22), one Judge dissenting (R. 22-25).

SPECIFICATION OF ERRORS TO BE URGED

The Court below erred—

(1) In holding that a suit against the United States in the District Court under the Tucker Act is not begun within the meaning of Section 3226 of the Revised Statutes, as amended, when the plaintiff's petition is filed with the Clerk of the District Court pursuant to Section 5 of the Tucker Act.

(2) In holding that a suit against the United States in the District Court under the Tucker Act is not begun within the meaning of Section 3226 of the Revised Statutes, as amended, until a copy of the plaintiff's petition is served upon the United States Attorney pursuant to Section 6 of the Tucker Act.

(3) In affirming the judgment of the District Court.

SUMMARY OF ARGUMENT

I. Section 3226 of the Revised Statutes requires that a suit to recover taxes shall be "begun" within two years after the disallowance of the claim for refund, but neither that section nor the provisions of the Tucker Act setting forth the procedure for suing the United States in the district courts define the beginning of a suit. It is therefore necessary to invoke the established principles of statutory interpretation as an aid to the determination of the legislative intent.

In common parlance to "begin" means to enter upon, set about, or take the first step, and the first decisive step required of a plaintiff under the Tucker Act is the filing of a petition. The ordinary meaning of the language should be adopted unless it clearly appears that the words were intended to have some other meaning. Service of a copy of the petition is the second step required by the Tucker Act, and there is nothing to indicate that the suit should not be regarded as begun until this second step is taken. In fact, the language and structure of the statute indicate that the suit is begun when the petition is filed.

Other statutes of limitations, containing language substantially the same as that found in Section 3226, have been held to be satisfied at a point short of service on the defendant. At common law, both in England and in this country, the "issuance" of a summons or other appropriate writ was regarded as the commencement of the action, and service within the limitation period was never required. In all cases, of course, the plaintiff must have had an honest intent to prosecute the action with diligence. While the procedure under the Tucker Act differs from that at common law, in that no summons is required, the judicial interpretation of statutes of limitations found in decisions under the common law furnishes a guide to the interpretation of the statutes here involved.

Decisions in equity cases are closely in point, since the Tucker Act procedure is almost identical with the procedure in equity. The equity rule is well settled, at least in the federal courts, which follow the English authorities, that the suit is commenced when the bill is filed. Although it has been stated in some cases that delivery of the subpoena to an officer for service marks the beginning of the suit, it has been held in the cases in which the issue was squarely presented that filing the bill is sufficient, provided the subsequent steps evidencing *bona fides* are taken with reasonable promptness. And the authorities all agree that the suit is begun at a point short of actual service.

In the absence of any provision clearly requiring that service be effected within the limitation period, Section 3226 of the Revised Statutes and Sections 5 and 6 of the Tucker Act must be construed in the light of the common law and equity decisions. When so construed, they clearly indicate that the suit is "begun" when the petition is filed.

The history of the statutes in question further indicates that filing the petition begins the suit. Prior to the enactment of the Tucker Act suits to recover taxes might be brought against collectors individually or in the Court of Claims. A suit in the Court of Claims was clearly begun by filing a petition, and the beginning of a suit against a collector was governed by the rules prevailing in the state courts. The Tucker Act was intended to provide another forum similar to the Court of Claims, with substantially the same jurisdiction and procedure, and the same limitations on suit. It would seem to require clear and specific language to indicate that the conditions which would satisfy the statute of limitations were intended to be different as between the Court of Claims and district courts sitting as courts of claims. The requirement that copies of the petition filed in the district court be served on the representatives of the Government does

not clearly indicate such intention. Service has always been required at common law and in equity, but it was never considered necessary to stop the running of statutes of limitations and Congress must have been well aware of that fact.

II. The court below was mistaken in finding in the language of the Tucker Act an implication that the suit is not to be regarded as begun at least until a copy of the petition has been served on the United States Attorney. The court based that inference on the principle requiring strict compliance with conditions upon which the sovereign has consented to be sued. But the question is not whether the provisions of the Tucker Act must be strictly observed. The question is *when* they must be observed. The fact that those provisions are mandatory does not warrant the conclusion that there must be compliance with them prior to the expiration of the period of limitations.

If the mandatory character of the provisions of Section 6 of the Tucker Act gives rise to the inference that suit is not begun until service is made on the United States Attorney, the conclusion is inescapable that suit is not begun until notice has been mailed to the Attorney General and an affidavit of service filed. The court below, however, found it unnecessary to pass on that question, and other courts have declined to follow the argument to its logical conclusion.

The court below further suggested that no jurisdiction is vested in the district court until the United States Attorney is served. Whether or not this be sound, we submit it is immaterial. Although in any litigation service is necessary to give the court jurisdiction over the defendant, the acquisition of such jurisdiction is not normally regarded as essential to stop the running of the statute of limitations. There is no reason for a different rule in actions against the sovereign.

Considerations of policy furnish no basis for the interpretation of the statutes adopted by the court below. Under our interpretation the Government is assured of notice of the suit within a reasonable time. It has sixty days from the date of service within which to answer. Practically, it can make no difference to the Government which interpretation is followed. Evidence of this is found in the case of actions against collectors of internal revenue, which are governed by local practice under the Conformity Act.

III. The authorities relied upon by the court below are neither weighty nor persuasive. In only three cases has the precise question been squarely raised and decided. In the only other decision by a Circuit Court of Appeals the court, being unable to find any controlling provision or inference in the federal statutes, decided the question under state law. The other two decisions were by district courts, which relied, erroneously as we contend, upon the principle of strict compliance with conditions governing suits against the sovereign. Statements in other cases are merely *dicta* and are not based on any analysis or extended consideration of the issue.

ARGUMENT

I.

APPLYING THE ESTABLISHED RULES OF STATUTORY INTERPRETATION, A SUIT UNDER THE TUCKER ACT IS "BEGUN" WHEN THE PETITION IS FILED IN THE DISTRICT COURT.

Section 3226 of the Revised Statutes, as amended by Section 1113 (a) of the Revenue Act of 1926 (*infra*, p. 39), provided that no suit to recover taxes should be begun after the expiration of five years from the date of payment "unless such suit or proceeding is begun within

two years after the disallowance" of a claim for refund. The question here is what constitutes the beginning of a suit, within the meaning of that section, when the suit is one brought against the United States in the district court.

Section 3226 does not define the commencement of a suit, nor does it contain any provision as to how a suit to recover taxes shall be brought. The procedure for prosecuting actions against the United States in the district courts, including actions to recover taxes, is prescribed by Sections 5 and 6 of the Tucker Act. Section 5 of that act provides that "in any suit brought" under the jurisdictional provisions now embodied in Section 24 (20) of the Judicial Code (formerly Section 2 of the Tucker Act) (*infra*, p. 38) the plaintiff shall file a duly verified petition setting forth the nature of his claim and certain other information. Section 6 provides that the plaintiff shall (1) cause a copy of the petition "filed under Section 5" to be served on the district attorney of the United States in the district wherein suit is brought, (2) mail a copy of the petition to the Attorney General by registered mail, and (3) thereupon file an affidavit of such service and mailing. These sections do not state which, if any, of the prescribed acts marks the beginning of the suit. They merely set forth the required procedure and do not purport to designate the point at which the suit is to be deemed instituted for purposes of statutes of limitations or for any other purpose. See *Walton* v. *United States*, 73 F. (2d) 15, 17 (C.C.A. 8th); *Spencer* v. *United States*, 14 F. Supp. 46, 47 (D. Mass.).

Since neither the statute of limitations itself nor the statute setting forth the procedure in suits against the United States in the district court defines the beginning or commencement of such a suit, the question becomes one of statutory interpretation, to be determined in accordance with established principles governing the interpretation of statutes.

A. Taking the words of the statutes in their ordinary sense, the filing of the petition is the beginning of the suit.

We consider first the language of Section 3226. It is well settled that words used in a statute are to be given their ordinary or popular meaning unless it clearly appears that they were intended to have some different signification. *Lynch* v. *Alworth-Stephens Co.*, 267 U. S. 364, 370; *Woolford Realty Co.* v. *Rose*, 286 U. S. 319, 327. If this test be applied, clearly a suit under the Tucker Act is "begun" when the petition is filed. The word "begin", in common parlance, means to enter on, set about, do the first act or take the first step in a course of action. See *Webster's New International Dictionary* (2d Edition). The first decisive step required of a plaintiff under the Tucker Act is the filing of a verified petition. When that is done, the plaintiff has performed the first overt act called for; he has entered upon the suit. In the sense in which the word is ordinarily used, the suit has been "begun". See *Burton* v. *Buckeye Ins. Co.*, 26 Ohio St. 467, 469.

We submit that there is nothing on the face of the Tucker Act to indicate any intention on the part of Congress that something more than the filing of the petition should be required before the action could be regarded as begun. In fact, the inference to be drawn from the statute is that the filing of the petition is sufficient. The provisions for filing the petition and for service of copies thereof appear in separate sections of the act. The requirement that a petition be filed appears first, in Section 5. Upon the filing of the petition the case is docketed in court. (See Docket Entries, R. 14.) The proceedings have been formally opened, and the nature of the claim has become a matter of public record. The provisions of the statute in regard to service appear in Section 6. This latter section refers to the petition "*filed* under Section 5", thus making it clear that the petition must be placed on record with the court before

notice is given to the Government. The giving of such notice, by serving a copy of the petition on the United States Attorney and mailing a copy to the Attorney General, is the second step in the proceedings. This can be done only after the suit has been filed with the clerk, and become a part of the records of the court. It is a second step following a separate and distinct first step defined in a separate section of the statute. We submit that there is no justification to be found in the language or structure of the statute for concluding that the suit is not begun until this second step is taken.

Section 6 contains, in addition to provisions for notifying the Government of the action, provisions defining the procedure to be followed by the United States Attorney in defending the interests of the Government, and also the procedure to be followed in the event the United States Attorney is derelict in his duty. These provisions, requiring the entry of an appearance and the filing of an answer, and providing for determination of the merits of the plaintiff's claim if no answer is filed, clearly deal with acts to be performed after the suit has been begun, and have nothing to do with the commencement of the action. The grouping of those provisions in the same paragraph with the provisions for service of the petition indicates that they were all regarded as being in the same category of things to be done after the suit had been begun, as distinguished from the things required by Section 5 to be done in order to begin the suit. And we submit that it is entirely logical so to regard them. Thus the incorporation of the requirement as to filing the petition in a separate section from that containing the requirements as to service was evidently not merely a matter of convenience in drafting but a matter of logical grouping of the procedural steps into (1) those having to do with the commencement of the action and (2) those having to do with the prosecution of the action after it has been begun.

We submit, therefore, that not only do the statutes fail to disclose any intention on the part of Congress that service must be effected within the limitation period, but the language and structure of the Tucker Act give rise to the inference that the filing of the petition constitutes the beginning of the suit. That would certainly be the normal interpretation of the act, taking its words in their natural and ordinary sense. Any other conclusion requires a strained and unnatural interpretation which we submit is unwarranted.

B. The judicially sanctioned meaning of the word "begun", as applied to the commencement of actions, further shows that a suit under the Tucker Act is begun when the petition is filed.

Section 3226 of the Revised Statutes is substantially the same in its language as other statutes of limitations which have been construed by the courts in numerous cases. Such statutes commonly provide that suit shall be "begun", "brought" or "commenced" within a specified time, and it is clear that although different words may be used to describe the initiation of the proceedings, those words all have the same meaning. *Goldenberg* v. *Murphy,* 108 U. S. 162, 163. Decisions construing other statutes of limitations furnish, therefore, a guide to the intent of Congress in regard to statutes limiting the time for bringing suit against the Government, since language having an accepted meaning sanctioned by judicial decision is presumed to have been used in that sense by the legislature. *Kepner* v. *United States,* 195 U. S. 100. Moreover, it is a familiar rule of statutory interpretation that all acts of Congress are to be read in the light of the common law. *United States* v. *Sanges,* 144 U. S. 310. That rule would appear to be particularly relevant to the instant question in view of the historical origin of statutes of limitations.

The common law rule, prevailing in England and most of the states of this country, is that an action is begun, brought or commenced for purposes of the statute of limitations when the plaintiff takes the first step required of him under the common law practice. The purpose of the statute being to bar a party who has slumbered on his rights, an act of legal diligence by the plaintiff within the statutory period is deemed sufficient. In *Johnson* v. *Smith,* 2 Burr. 950, 961, Lord Mansfield said:

> "The statute did not intend to bar, unless the party had *acquiesced* for six years. But he who sued out a *latitat,* to bring the defendant into custody that he might declare against him, *did not acquiesce,* within the *true meaning* of the act; * * * * *"

And in *Society for Propagating the Gospel* v. *Whitcomb,* 2 N. H. 227, it was said (at p. 232):

> "Because suing out the writ with a view to service is an act of legal diligence within the time of limitation; it shows, that the party has not slumbered the period prescribed to bar his rights; and, therefore, rebuts the inference of payment, release, or other species of discharge, on which the statute is principally bottomed."

See also *Hail* v. *Spencer,* 1 R. I. 17, 21; *Johnson* v. *Farwell,* 7 Greenleaf, (Me.) 370, 374; *Randall* v. *Bacon,* 49 Vt. 20, 21, 22.

The first step in a common law action is the "issuance", "purchase" or "suing out" of a writ. That act and not service of the writ upon the defendant is, therefore, a sufficient commencement of the action to bar the running of the period of limitations. Such was the rule in England. *Johnson* v. *Smith,* 2 Burr. 950; *Brown* v. *Babbington,* 2 Ld. Raymond, 880; *Parsons* v. *King,* 7 Term Rep. 6; *Beardmore* v. *Rattenbury,* 5 Barn. & Ald. 452; Wood, *Limitations* (4th Edition), Sec. 289. The same rule has been followed in most of our states in the absence of

express statutory provision otherwise defining the commencement of an action. In *Hail* v. *Spencer*, 1 R. I. 17, it was said (pp. 18, 20):

> "Our act of limitations seems to be not materially different from the English statute, adopted as early as the reign of James I. And it seems to be reasonable to conclude that the English construction was perfectly understood by our legislature. If, therefore, the language of both statutes is substantially the same, our legislature must have used the language with a view to the meaning given to it by English courts. In fact the principles of the decisions of those courts have been uniformly recognized in ours, as truly expounding the meaning of the act. If the issuing of the English *capias* be considered in the common pleas, then, the commencement of the suit, (and it in fact is in all cases where an outlawry is not contemplated) there can be no good reason why the issuing of our writ of arrest, or original summons, (which takes the place of the arrest) should not, on like principles, be deemed the commencement of the suit. * * *
>
> * * * * * * *
>
> "We have been unable to ascertain, that in any state, with the exception of Connecticut, the service of the writ is considered the commencement of the action. It is believed, that all other states consider the issuing of the writ as the commencement of the suit. * * *"

Where the process is issued by the court itself upon the filing of a praecipe or docketing of the case, as, for example, in Pennsylvania, the action is deemed commenced when the praecipe is so filed. *Gibson* v. *Pittsburgh Transportation Company*, 311 Pa. 312. See also *Lawrence* v. *Winifrede Coal Co.*, 48 W. Va. 139; *Bank of the United States* v. *Lyles*, 10 Gill & J. (Md.) 326. Where the "issuance" of the writ is simply the filling out of a blank form by the plaintiff's attorney himself, perhaps in his own office, or the procuring of a writ from the clerk, the

courts differ somewhat as to when the writ is issued. "Issuance" requires a *bona fide* and unconditional intention to have the writ served. In some jurisdictions that may not be shown unless steps have been taken to put it into the hands of an officer for service; although actual delivery to the officer is probably not required. See *Burdick* v. *Green,* 18 Johns. (N. Y.) 14, 20; *Mutual Savings Fund Harmonia* v. *Gunne,* 110 N. J. L. 41; *United States* v. *Northern Finance Corp.,* 16 F. (2d) 998, 999 (C. C. A. 2d). But in most jurisdictions, the date on which the writ is made out is *prima facie* the date it is issued. Such is the rule in Massachusetts: *Gardner* v. *Webber,* 17 Pick. 407; *Pierce* v. *Tiernan,* 280 Mass. 180, 182; *Cincotta* v. *Dupuy,* Mass. Adv. Sh. (1936) 991 (1 N. E. (2d) 182); in New Hampshire: *Society for Propagating the Gospel* v. *Whitcomb,* 2 N. H. 227; *Anderson* v. *Aetna Life Insurance Society,* 75 N. H. 375; *Mason* v. *Cheney,* 47 N. H. 24; in Maine: *Johnson* v. *Farwell,* 7 Greenleaf 370; in Vermont: *Day* v. *Lamb,* 7 Vt. 426; *Chapman* v. *Goodrich,* 55 Vt. 354; in Rhode Island: *Hail* v. *Spencer,* 1 R. I. 17; and in North Carolina: *Haughton & Booth* v. *Leary,* 20 N. C. 21. See also *Jincey* v. *Winfield's Adm'r.,* 9 Gratt. (Va.) 708, 721. All the jurisdictions, however, with the exception of Connecticut, agree that it is the issuing of the writ and not service upon the defendant that marks the commencement of an action at common law. This rule is subject to the requirement that the writ must actually be served within a reasonable time. Thus there is no possibility that an action may be begun and kept pending for an indefinite period without the knowledge of the defendant and suddenly be pressed years later when it suits the plaintiff's convenience. The necessity for service within a reasonable time after the issuance of the writ safeguards the defendant against this danger.

While the procedure under the Tucker Act differs from common law procedure in that no summons or other writ is required, the principles laid down in the decisions at

common law are readily applicable here. In those cases the statutes of limitations were construed as requiring the plaintiff by formal act to invoke the intervention of the courts. This requirement was held to be satisfied when the plaintiff took the first procedural step, provided he manifested diligence in the further prosecution of the action. Under the Tucker Act the first procedural step is the filing of a petition, an act which shows even more significantly than the mere taking out of a writ that the plaintiff does not "acquiesce".[1]

The decisions in equity cases furnish even stronger support for our interpretation of the statutes involved here. In equity, as under the Tucker Act, the first step required of the plaintiff is the filing of a petition or bill of complaint. The subsequent steps are almost identical under the two forms of practice, equity requiring the service of a subpoena and the Tucker Act calling for service of a copy of the petition. The equity rule as to the commencement of the proceedings is succinctly stated in *Mound City Co.* v. *Castleman,* 187 Fed. 921, 925 (C.C.A. 8th):

> "A suit is commenced by the filing of the petition or bill with the honest intention to prosecute the suit diligently provided there is no detrimental or unreasonable delay in the subsequent issue or service of the process."

Such has long been the rule in England since it was provided in 4 Anne, c. 16, sec. 22, that the bill must be filed before process will issue. *Coppin* v. *Gray,* 1 Y. & C. 205; see also *Purcell* v. *Blennerhasset,* 3 Jo. & Lat. 24. And the same rule is now firmly established in the federal

---

[1]The Court of Claims has observed that a petition filed in that court performs the functions of both declaration and process, and the same would appear to be true of petitions filed in the district courts under the Tucker Act. *Duran* v. *United States,* 31 C. Cls. 353, 358.

courts in this country. *Linn & Lane Timber Co.* v. *United States*, 236 U. S. 574, 578; *United States* v. *Hardy*, 74 F. (2d) 841 (C.C.A. 4th); *Equitable Life Assurance Society* v. *Schwartz*, 42 F. (2d) 646 (C.C.A. 5th); *Farbwerke Vormals Meister Lucius & Brüning* v. *Diarsenal Co.*, 21 F. (2d) 588 (W.D.N.Y.); *Armstrong Cork Co.* v. *Merchants' Refrigerating Co.*, 184 Fed. 199 (C.C.A. 8th); *Humane Bit Co.* v. *Barnet*, 117 Fed. 316 (C.C.N.J.). While it is sometimes broadly stated that not only must the bill be filed, but the subpoena must also be lodged with the proper officer for service (see *United States* v. *American Lumber Co.*, 85 Fed. 827 (C.C.A. 9th); *United States* v. *Miller*, 164 Fed. 444 (C.C.D. Oregon); *United States* v. *Northern Finance Corp.*, 16 F. (2d) 998, 999 (C.C.A. 2d)), it has been held in the cases in which the point has been squarely presented that the mere filing of the bill stops the running of the statute of limitations. *United States* v. *Hardy, supra; Farbwerke Vormals Meister Lucius & Brüning* v. *Diarsenal Co., supra;* cf. *Armstrong Cork Co.* v. *Merchants' Refrigerating Co., supra.* See also *Farmers' Loan & Trust Co.* v. *Lake Street Elevated Railroad Co.*, 177 U. S. 51, 60. In a recent equity suit brought by the Government to collect taxes from transferees of the taxpayer, the suit was held to have been begun within time by the filing of the bill although process did not issue until after the period of limitations had expired. *United States* v. *Adams*, 92 F. (2d) 395 (C.C.A. 5th). And the cases all agree that the suit is commenced at a point short of service of the subpoena.

In this connection it should be noted that Equity Rules 12, 13 and 15 require that after the bill has been filed a subpoena shall be issued and served on the defendant. Notwithstanding this requirement, which has the force of law (*Roosevelt* v. *Missouri State Life Ins. Co.*, 70 F. (2d) 939, 945 (C.C.A. 8th)), this Court and other federal courts have held that service on the defendant is not essential to the commencement of the suit.

Thus the word "begun", considered as a word of art, has substantially the same meaning as in common parlance. In view of the wealth of authorities both at law and in equity, holding that service of process is not essential to stop the running of statutes of limitations, it is difficult to perceive any basis for ascribing a different meaning to the limitation provisions of Section 3226. There is nothing in the language of that section indicating that Congress intended to depart from the established rule. Nor, we submit, is any such purpose disclosed by the language of either Section 5 or Section 6 of the Tucker Act, which do not purport to deal with questions of limitations, but merely state the procedure to be followed in suing the Government. On the contrary, there would appear to be a strong inference that the limitation provision of Section 3226 is satisfied by the filing of the petition.

C. The statutory history of the provisions in question further indicates that the filing of the petition under the Tucker Act is the beginning of the suit.

If we look at the provisions of Section 3226 of the Revised Statutes and of Sections 5 and 6 of the Tucker Act in the light of their historical setting, we find further evidence that Congress intended the filing of the petition in the district court to constitute the beginning of the suit.

Section 3226 of the Revised Statutes, of course, antedates the Tucker Act. In its original form it forbade the maintenance of a suit in any court for the recovery of any internal tax alleged to have been illegally or erroneously assessed or collected until appeal should be made to the Commissioner of Internal Revenue and a decision of the Commissioner had thereon, provided, that if the decision were delayed more than six months, suit might be brought without a decision within the time limited by

Section 3227. The latter section provided that no such suit should be maintained in any court "unless the same is brought within two years next after the cause of action accrues."

At the time these sections were adopted one avenue open to taxpayers for the recovery of taxes illegally or erroneously collected was a common law action of assumpsit against the collector in the state or federal courts. *City of Philadelphia* v. *The Collector,* 5 Wall. 720; *The Collector* v. *Hubbard,* 12 Wall. 1; *Elliott* v. *Swartwout,* 10 Peters 137. Such actions, although in form against the individual collector, in substance were a method of recovering against the United States. *City of Philadelphia* v. *The Collector,* 5 Wall. 720, 733; *George Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, 380, 381. In limiting the right to such recovery, Congress might itself have defined the procedure and required that certain steps in that procedure be taken within the period of limitations. It did not do so. It was content to provide simply that action be "brought" within the time limited, leaving the question of when it was "brought" to be determined by the rules prevailing in the several states. The normal rule, as we have pointed out above, was that a common law action was "brought" or "begun" upon the issuance of the writ, or summons. With this rule Congress was, of course, perfectly familiar.[2]

The second avenue open to the taxpayer was by suit in the Court of Claims to recover the amount allowed by the Commissioner of Internal Revenue on the appeal made to him pursuant to R. S. §3226. *United States* v. *Kaufman,* 96 U. S. 567; *United States* v. *Savings Bank,* 104 U. S.

---

[2] *Cf.* Section 643 of the Revised Statutes, providing for removal of suits against collectors to the circuit courts, which prescribes the duty of the clerk of the circuit court "When the suit is commenced in the State court by summons, subpoena, petition or another process except capias . . ." and "When it is commenced by capias or any other similar form of proceeding by which a personal arrest is ordered . . ."

728. The method of beginning suit in that court was by the filing of a petition in the form prescribed by Section 1072 of the Revised Statutes. That the filing of such a petition was sufficient for the purposes of the statute of limitations is manifest from Section 1069 which provided that every claim cognizable in the Court of Claims should be barred "*unless the petition* setting forth a statement thereof *is filed in the court or transmitted to it* by the Secretary of the Senate or the Clerk of the House of Representatives as provided by law" within six years. (Italics ours.) The taxpayer, therefore, would have "brought" his suit in the Court of Claims as soon as he had filed his petition.

In enacting Sections 3226 and 3227 of the Revised Statutes, therefore, Congress did not purport to adopt any new rule as to what steps the taxpayer must take to bring his suit within the time limited. The right to sue was conditioned upon prompt bringing of the suit. But when suit was to be deemed "brought" was to be determined by the rules prevailing in the courts where the taxpayer sued.

When the Tucker Act was enacted, the conditions on the right to sue for the recovery of taxes were thus well defined. That Act did not impose new conditions on the right nor deal directly with the statute of limitations applicable to it. The Act did create a new forum in which that right might be exercised and provided a procedure for that forum. And it seems to be contended that the necessary effect of the procedure was to require a taxpayer to do something in addition to what had previously been required in order to "bring" his suit.

No such change was effected so far as suit in the Court of Claims was concerned. Section 1 of the Act redefines the jurisdiction of that Court. But it does not change the procedure by which suits in that court were to be instituted. See *Chase* v. *United States*, 155 U. S. 489, 500. Before the Tucker Act, as we have pointed out, a suit was

brought in the Court of Claims by the filing of a verified petition. After the Tucker Act, the rule remained the same. Section 1 of that Act contained a general proviso that no suit "shall be allowed under this act unless the same shall have been brought within six years after the right accrued". But since there was nothing in the Act to indicate that a suit should be "brought" in a different way than had been the rule theretofore, the filing of a petition must still have constituted the bringing of suit. And that is clearly the rule today. See Sec. 156 of the Judicial Code (U. S. C., Title 28, Sec. 262).

In creating the new forum in which suits might be brought against the government—the district and circuit courts of the United States—it was certainly competent for Congress to have provided that something more was necessary to constitute the "bringing" of suit in those courts than was required in the Court of Claims. But, we submit, such an intention is not lightly to be inferred. The whole scheme of the Tucker Act was that suits might be brought in either of the two forums indifferently. In exercising their jurisdiction under the Tucker Act the district and circuit courts were simply "sitting as courts of claims". *Reid* v. *United States,* 211 U. S. 529, 534. The jurisdiction, procedure, and method of review in the Court of Claims and the district and circuit courts were to be similar. Section 2 of the Act vests in the district and circuit courts "concurrent jurisdiction". No matters were cognizable by them which fell outside the jurisdiction of the Court of Claims. See *United States* v. *Jones,* 131 U. S. 1. The method of direct review by this Court of decisions of both courts was the same. *United States* v. *Davis,* 131 U. S. 36; *Chase* v. *United States,* 155 U. S. 489; *J. Homer Fritch, Inc.* v. *United States,* 248 U. S. 458. The requirement for specific findings of fact and the scope of review of such findings was the same. See *Chase* v. *United States,* 155 U. S. 489, 500. One would not expect, therefore, that Congress would have provided

a different statute of limitations in one forum than in the other. Nor did it do so.

In *United States* v. *Greathouse,* 166 U. S. 601, 606, this Court had to consider whether the provisions of Section 1069 of the Revised Statutes, as to the tolling of the statute of limitations in suits in the Court of Claims when the claimant is under certain disabilities, was repealed by the proviso in Section 1 of the Tucker Act requiring suits to be brought within six years. In holding that the disability provisions were to be read into the limitations proviso in the Tucker Act, this Court said (at p. 606):

> "We may add that it was not contemplated that the limitation upon suits against the Government in the District and Circuit Courts of the United States should be different from that applicable to like suits in the Court of Claims."

That this construction accurately represented the intention of Congress is evident from the fact that when the provisions of Section 2 of the Tucker Act were reenacted in Section 24 (20) of the Judicial Code, *infra,* p. 38, the proviso as to tolling the statute in event of disability was expressly written into the law as to suits in the district courts.

Thus the period of limitations as well as the jurisdiction, procedure and provisions for review were identical in both courts.

To have imposed a condition precedent to the "beginning" or "bringing" of a suit in the district and circuit courts which did not exist in the Court of Claims would have been quite inconsistent with the general theory of the Tucker Act. Congress might nevertheless have done so. But it would seem to require clear and specific language to overcome the natural inference that such was not its intention. Such language, we submit, is not to be found in the Act.

The argument that Congress intended to impose an additional condition on the "beginning" of suit in the dis-

trict courts is founded simply on the fact that it required the plaintiff in such a suit to serve the petition, mail a copy to the Attorney General and file an affidavit of such service and mailing. These steps were not required of the plaintiff in the Court of Claims because under the practice of that court the clerk forwards a copy of the petition to the Attorney General. But, we submit, the requirement that these additional steps be taken in suits in the district court is no indication at all that Congress intended them to affect the operation of the statute of limitations in that court. They are normal procedural requirements. In common law actions and in suits in equity it is always necessary that the defendant be served and usually that he be furnished with a copy of the pleading. These requirements, as we have already shown, do not constitute conditions to the "beginning" or "bringing" of suit for purposes of the statute of limitations. Certainly had Congress intended to provide that the limitation period should operate differently in district courts than in the Court of Claims, it would have found a more apt way of expressing its intention than by providing for service and notice which normally have no effect upon the question of limitations. It cannot have intended to lay a trap for the unwary and to alter the application of Sections 3226 and 3227 of the Revised Statutes under the guise of procedural requirements having no such apparent effect.

II.

THE FACT THAT THE STATUTES HERE INVOLVED RELATE TO SUITS AGAINST THE GOVERNMENT DOES NOT JUSTIFY THE INTERPRETATION PLACED UPON THEM BY THE COURT BELOW.

The court below, conceding that neither Section 3226 of the Revised Statutes nor any provision of the Tucker Act expressly defines the commencement of a suit against the United States, found in Sections 5 and 6 of the Tucker

Act an implied provision that suit is not begun at least until a copy of the petition is served on the United States Attorney. (R. 21.) Clearly nothing in Section 3226 supports that implication. Equally clearly, we submit, nothing in the language of Sections 5 and 6 of the Tucker Act could be regarded as giving rise to such an implication if that Act were concerned with suits between private individuals. Service upon defendants, in addition to the filing of a petition or complaint, is universally required under our system of jurisprudence even in the absence of statute, and the necessity for service at some stage of the proceedings has always been recognized by the courts which have held that service is not essential to the *commencement* of the action.

The opinion below makes it clear that the implied requirement which the court found in the Tucker Act was based, not simply on the language of the act taken in either its ordinary sense or in its technical legal sense, but on the general principle that there must be strict compliance with conditions upon which the sovereign has consented to be sued. Solely because of that principle the court concluded that the filing of the petition was not sufficient to stop the running of the statute of limitations, but that there must also be service upon the United States Attorney within the statutory period. No such inference was found in *Walton* v. *United States,* 73 F. (2d) 15 (C.C.A. 8th) where the court held that in the absence of a controlling act of Congress the question must be determined under the local law.

We submit that the principle invoked by the court does not support its interpretation of the statutes. Conceding that the provisions of Section 6 of the Tucker Act are mandatory and must be complied with, it does not necessarily follow that they are "conditions precedent to the *bringing* of the proceeding against the United States" (R. 21. Italics ours). The question here is not whether those conditions must be strictly observed. The peti-

tioner in the instant case complied with them meticulously. The question is *when* they must be observed, and we submit that their mandatory character is not determinative of that question.

The fallacy in the reasoning of the court below lies in its failure to distinguish between conditions on the right to *begin* suit and conditions on the right to *maintain* suit. We submit that none of the provisions of Sections 5 and 6 of the Tucker Act can properly be regarded as conditions on the right to bring suit. The filing of the petition is the act constituting beginning of suit rather than a condition precedent to the beginning of the suit. Examples of conditions precedent to the commencement of a suit against the United States for the recovery of taxes include such requirements as the filing of a claim for refund and a delay of six months thereafter to afford the Commissioner an opportunity for adequate consideration of the claim. See *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269. The provisions of Section 6 of the Tucker Act in regard to service on the United States Attorney and the Attorney General and the filing of notice thereof are in the nature of conditions subsequent. A suit properly begun by compliance with the provisions of Section 5 might abate on the failure to observe these subsequent requirements of Section 6. But they are not prerequisites to beginning the suit. Rather they are requirements that must be met in order to maintain a suit already begun, so as to uphold it, continue it on foot and prevent it from collapse. See *George Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 377. Thus even though the provisions of Section 6 are conditions on the waiver of sovereign immunity from suit, the principle of strict compliance clearly does not warrant the conclusion that they must be complied with before the suit may be deemed to have been begun.

To the objection that the statutes do not expressly state that the petition must be served within the limitation

period, the court replies that the same is true as to the time of filing the petition. We submit that this does not answer the objection. Manifestly, either the filing of the petition or some subsequent act must mark the beginning of the suit. Our contention is that the filing would normally be regarded as the commencement of the action, and that it should be so regarded in the absence of express statutory provision that the suit is not begun until some other act is performed. The absence of a provision as to the time for filing the petition clearly does not support the conclusion that the petition must be served within the limitation period.

If the fact that the provisions of Section 6 of the Tucker Act are mandatory warrants the inference that the action is not begun until service is made on the United States Attorney—and no other basis for that inference is suggested by the court below—then it logically follows that the statute of limitations is not satisfied until a copy of the petition has been mailed to the Attorney General and an affidavit of service been filed. These latter requirements appear in the same section and in the same sentence of that section as the requirement for service on the United States Attorney, and would seem to be equally mandatory. The court below found it unnecessary to pass upon that question (R. 22). Other courts have shown reluctance to follow the argument to its logical conclusion. Thus in *Munro* v. *United States*, 89 F. (2d) 614, affirmed by this Court on January 31, 1938, October Term, 1937, No. 218, the Circuit Court of Appeals expressed the opinion, which was not necessary to its decision, that there must "at the least" be service on the United States Attorney (p. 616). In cases in which the issues have been squarely presented it has been held that the provisions for notice to the Attorney General and filing an affidavit of service are not jurisdictional but may be waived by the representative of the Government or may, if not waived, be complied with after jurisdiction

has vested in the Court and *a fortiori,* it would seem, after the proceedings have been commenced. *Little* v. *United States,* 54 F. (2d) 711 (W.D.La.); *Wilhelm* v. *United States,* 18 F. Supp. 600 (M.D.N.C.); *Jones* v. *United States,* (N.D. Ohio) not officially reported, but found in 1936 C.C.H. Federal Tax Service, Vol. 4, par 9072; *Hostetter* v. *United States* (W.D. Pa.) not officially reported, but found in 1937 C.C.H. Federal Tax Service, Vol. 4, par. 9436. In *Irving Trust Co.* v. *United States* (S.D. N.Y.) not officially reported, but found in 1935 C.C.H. Federal Tax Service, Vol. 3-A, par. 9600, the court held that Section 3226 of the Revised Statutes had been satisfied notwithstanding failure to file an affidavit of service within the statutory period. If compliance with these requirements is not essential to the commencement of the suit, then the reasoning of the court below is clearly inadequate to support its decision. See also, *United States* v. *Hvoslef,* 237 U. S. 1; *Griffin's Case,* 13 C.Cls. 257.

It is suggested by the court below that jurisdiction is not acquired by the district court until the United States Attorney has been served, and there is an inference that the statute of limitations is not satisfied until jurisdiction vests (R. 21). It is not altogether clear what jurisdictional requirements the court has in mind. Section 24 (20) of the Judicial Code (*infra,* p. 38) confers jurisdiction of the subject matter of the suit. If the court regards service on the United States Attorney as conferring on the district court "personal" jurisdiction over the Government, that concept does not support the conclusion that the statute of limitations is not satisfied until such jurisdiction is acquired. The authorities cited *supra* at pages 12-16 show conclusively that the acquisition of personal jurisdiction by service on the defendant is not normally regarded as essential to the commencement of the action, although it is essential to its maintenance. See also *United States* v. *Chase Securities Corp.,*

24 F. (2d) 500 (C. C. A. 1st); *Vincent* v. *McElvain*, 304 Ill. 160. And if the court has reference to the jurisdictional character of statutes limiting actions against the sovereign, it is clearly begging the issue to say that jurisdiction did not vest because the suit was not timely begun.

Reasons of convenience or policy furnish no basis for the implication read into the Tucker Act by the court below. The filing of the petition is adequate evidence of diligence on the part of the plaintiff. Under the rule established at common law and in equity the defendant is assured of notice within a reasonable time. Under Section 6 of the Tucker Act the time for filing an answer runs from the date of service on the United States Attorney, so that delay in service cannot prejudice the Government in preparing its pleadings. And it would be fantastic to suggest that a further delay of a few days, or such time as the court might hold to be reasonable under all the circumstances, after the filing of the petition and before service, would inconvenience the Government in obtaining or preserving evidence. In this respect the Government is in no different position from any other litigant. From a practical standpoint, it can make no difference to the Government whether the action is held to be commenced by the service of the petition or by its filing. This is clearly demonstrated by the fact that no uniform practice has been established for suits against collectors of internal revenue. Such suits, being actions between private individuals, are governed by local practice pursuant to the Conformity Act, and the local practice may or may not require service before the suit is deemed to be begun. Although the Government is the real party in interest in such cases, we are not aware that it regards its rights as being prejudiced in those states in which the issuance of a summons or the filing of a complaint constitutes the beginning of the action.

We submit, therefore, that there is no justification for interpreting the statutes here involved in a manner different from that in which other limitation statutes have been construed. Neither the statutory language nor general principles governing suits against the sovereign warrant a departure from the usual rule that an action is commenced when the first procedural step is taken. Had Congress intended otherwise it could readily have so provided. In the absence of express provision, or language giving rise to a clear inference, it must be held that the statute of limitations was satisfied by the filing of the petition.

III.

THE AUTHORITIES CITED BY THE COURT BELOW AND OTHERS COMMONLY RELIED ON IN SUPPORT OF THE GOVERNMENT'S CONTENTION ARE NEITHER WEIGHTY NOR PERSUASIVE.

The court below cites several cases in support of its holding that by implication the language of the Tucker Act requires that there must be both filing and service of the petition before the proceeding is begun (R. 21). In only three of those cases, and we have been unable to find any others, was the present question squarely raised and decided. *Walton* v. *United States,* 73 F. (2d) 15 (C. C. A. 8th); *Creasy* v. *United States,* 4 F. Supp. 175 (W. D. Va.); *Bachmann, Emmerich & Co. Inc.* v. *United States* (S. D. N. Y.), decided June 4, 1935, not officially reported, but found in 1935 C. C. H. Federal Tax Service, Vol. 3-A, par. 9427. In *Walton* v. *United States,* 73 F. (2d) 15 (C. C. A. 8th), a petition was filed in time, but no service was made until after the statutory period had expired. The court not only held that there was no express provision in the Tucker Act defining the beginning of a suit, but found no implication in the language of the Act in regard to that question, for it concluded that in the absence of a controlling act of Congress the question might

be determined by the local law. Since the local statute provided that a civil action was commenced by service of a summons, the court held by analogy that a suit under the Tucker Act is commenced by service of a copy of the petition on the United States Attorney.

In the second of these cases, *Creasy* v. *United States*, 4 F. Supp. 175 (W. D. Va.), it was held that the filing of the petition did not satisfy the statute of limitations applicable to suits on policies of war risk insurance when service was not effected until two days after the period had run. This result was reached upon the ground that since suits against the United States were solely by its permission, the procedure prescribed must be literally complied with. The reasoning of the court is hardly persuasive. It seems to have proceeded under the misapprehension that the Tucker Act specifically provided what constitutes the beginning of a suit, since it stated (p. 179):

> "It is provided in title 38, §445, U. S. C., 38 U. S. C. A. §445 (by reference to title 28, §763), that suit shall be begun by causing a copy of the petition to be served upon the district attorney of the United States in the district where suit is brought, and causing an affidavit of such service to be filed with the Clerk of court."

To paraphrase the language of Section 763 in this manner is, we submit, to assume the answer to the very question in controversy.

The third case is *Bachmann, Emmerich & Co. Inc.* v. *United States* (S. D. N. Y.), decided June 4, 1935, not officially reported, but found in 1935 C. C. H. Federal Tax Service, Vol. 3-A, par. 9427. That was a tax refund suit, in which the petition was seasonably filed but not served until a few days after the statute had run. The court granted a motion to dismiss, on the theory, which we have urged is erroneous, that since there must be strict compliance with the statutory provisions, all of the requirements of Sections 5 and 6 of the Tucker Act must be met before the suit can be regarded as commenced.

These authorities and the court below refer to and rely upon a number of other cases in support of the view that in a suit under the Tucker Act service of the petition must be made before the expiration of the statutory period. Some of the cases relied upon contain dicta to that effect. Others neither discuss nor involve any question of the statute of limitations.

The earliest, and perhaps most frequently cited, case is *Reid Wrecking Company* v. *United States*, 202 Fed. 314 (N. D. Ohio) in which the sole point raised was whether proceedings against the United States should be quashed on the ground that they were not brought in the district where the plaintiff resides, as required by Section 5 of the Tucker Act, the point having been timely raised by the Government. The statute of limitations was in no way involved or referred to by the court. The case is authority merely for the proposition that the mandatory requirements of Section 5 of the Tucker Act, being conditions on the consent of the United States to be sued, must be complied with if promptly insisted upon by the Government.

National Casket Company v. *United States*, 263 Fed. 246 (S. D. N. Y.) and *Cassarello* v. *United States*, 265 Fed. 326 (M. D. Pa.) are also commonly cited in support of the requirement of service of the petition before the expiration of the statutory period. In these cases the only question was whether the provisions of the Tucker Act were at all applicable to suits against the Government under the Lever Act and under an act providing for suits on war risk insurance policies, Act of October 6, 1917, respectively, both statutes being silent on the question. In holding that the Tucker Act procedure governed, the courts had no occasion to, and did not, discuss which of the procedural steps prescribed by that Act marks the beginning of the suit for purposes of the statute of limitations.

Finally there is a group of cases in which the courts stated, although the point was not before them for decision, that service of the petition marks the commencement of a suit under the Tucker Act. *Miller* v. *United States,* 11 F. Supp. 924, 925 (W. D. N. Y.); *Henry* v. *United States,* 15 F. Supp. 651, 652; *Munro* v. *United States,* 89 F (2d) 614, 616 (C. C. A. 2d), aff'd, October Term, 1937, No. 218; *Spencer* v. *United States,* 14 F. Supp. 46, 47 (D. Mass.). In all these cases except the *Spencer* case, the point at issue was whether a suit on a war risk insurance policy might be instituted by issuance and service of summons in accordance with local practice by virtue of the Conformity Act. In the *Spencer* case, the question was whether the signing and verification of a petition was sufficient to commence suit, the plaintiff having died before the petition was filed. In none of these cases was it material to discuss the necessity of serving as well as filing the petition to stop the running of the statute of limitations. Nor did the courts purport to consider or discuss that problem with any fullness. These casual statements to the effect that service of the petition marks the commencement of the suit were made without any analysis or extended consideration of the issue. They are based in large measure simply on the ground that the requirements of the Tucker Act are mandatory and in reliance on the authority of the *Reid, National Casket Co.* and *Cassarello* cases which do not deal with the point. These dicta, we submit, are neither weighty nor persuasive.

Manifestly the decision of this Court in *Munro* v. *United States,* October Term, 1937, No. 218, does not cover the instant case. The affirmance of the decision of the Circuit Court of Appeals cannot, of course, be construed as an approval or adoption of the dictum in its opinion, that the requirement of service must be met before the period of limitations has run. Nor is there anything in the opinion of this Court to that effect. The statement in

the opinion that the requirements of neither Sections 5 or 6 were complied with within the period of limitations was simply a statement of fact. It was not intended, we submit, to indicate that, if the requirements of Section 5 as to filing a petition had been met in time, the suit would nevertheless have been barred for failure to serve within the statutory period.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

CHARLES B. RUGG,
H. BRIAN HOLLAND,
WARREN F. FARR,
EVERETT H. MAXCY,
Counsel for Petitioner.

ROPES, GRAY, BOYDEN & PERKINS,
Of Counsel.

February, 1938.

APPENDIX

Revised Statutes, Chapter Twenty-One, dealing with the jurisdiction powers and procedure of the Court of Claims, provided in part:

"SEC. 1059. The Court of Claims shall have jurisdiction to hear and determine the following matters:

First. All claims founded upon any law of Congress, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, and all claims which may be referred to it by either House of Congress.

Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the Government of the United States against any person making claim against the Government in said court.

Third. The claim of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility on account of capture or otherwise, while in the line of his duty, of Government funds, vouchers, records, or papers in his charge, and for which such officer was and is held responsible.

Fourth. Of all claims for the proceeds of captured or abandoned property, as provided by the act of March 12, eighteen hundred and sixty-three, chapter one hundred and twenty, entitled 'An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States,' or by the act of July two, eighteen hundred and sixty-four, chapter two hundred and twenty-five, being an act in addition thereto: *Provided,* That the remedy given in cases of seizure under the said acts, by preferring claim in the Court of Claims, shall be exclusive, precluding the owner of any property taken by agents of the Treasury Department as abandoned or captured property

in virtue or under color of said acts from suit at common law, or any other mode of redress whatever, before any court other than said Court of Claims: (*Provided also,* That the jurisdiction of the Court of Claims shall not extend to any claim against the United States growing out of the destruction or appropriation of, or damage to, property by the Army or Navy engaged in the suppression of the rebellion.)"

"SEC. 1060. All petitions and bills praying or providing for the satisfaction of private claims against the Government, founded upon any law of Congress, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, shall, unless otherwise ordered by resolution of the House in which they are introduced, be transmitted by the Secretary of the Senate or the Clerk of the House of Representatives, with all the accompanying documents, to the Court of Claims."

"SEC. 1069. Every claim against the United States, cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives as provided by law, within six years after the claim first accrues: *Provided,* That the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively."

"SEC. 1072. The claimant shall, in all cases, fully set forth in his petition the claim, the action thereon in Congress, or by any of the Departments, if such action has been had; what persons are owners there-

of or interested therein, when and upon what consideration such persons became so interested; that no assignment or transfer of said claim, or of any part thereof or interest therein, has been made, except as stated in the petition; that said claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; that the claimant, and, where the claim has been assigned, the original and every prior owner thereof, if a citizen, has at all times borne true allegiance to the Government of the United States, and, whether a citizen or not, has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, and that he believes the facts as stated in the said petition to be true. And the said petition shall be verified by the affidavit of the claimant, his agent, or attorney."

Act of March 3, 1887 (Tucker Act), c. 359, 24 Stat. 505, 506, provided in part:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Court of Claims shall have jurisdiction to hear and determine the following matters:

First. All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however,* That nothing in this section shall be construed as giving to either of the courts herein mentioned, jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as 'war claims', or to hear and determine other claims, which have heretofore been rejected, or reported on adversely by any court, Department, or commission authorized to hear and determine the same.

Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided*, That no suit against the Government of the United States, shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made.

SEC. 2. That the district courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the circuit courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars. All causes brought and tried under the provisions of this act shall be tried by the court without a jury.

* * * * *

SEC. 4. That the jurisdiction of the respective courts of the United States proceeding under this act, including the right of exception and appeal, shall be governed by the law now in force, in so far as the same is applicable and not inconsistent with the provisions of this act; and the course of procedure shall be in accordance with the established rules of said respective courts, and of such additions and modifications thereof as said courts may adopt.

SEC. 5. That the plaintiff in any suit brought under the provisions of the second section of this act shall file a petition, duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or other thing claimed, or the damages sought to be recovered and praying the court for a judgment or decree upon the facts and law.

SEC. 6. That the plaintiff shall cause a copy of his petition filed under the preceding section to be served upon the district attorney of the United States in the district wherein suit is brought, and shall mail a copy of the same, by registered letter, to the Attorney General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the district attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the Government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case to file a plea, answer, or demurrer on the part of the Government, and to file a notice of any counterclaim, set-off, claim for damages, or other demand or defense whatsoever of the Government in the premises: *Provided,* That should the district attorney neglect or refuse to file the plea, answer, demurrer, or defense, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises; but the plaintiff shall not have judgment or decree for his claim, or any part thereof, unless he shall establish the same by proof satisfactory to the court."

Section 1059 of the Revised Statutes and Section 1 of the Tucker Act, defining the jurisdiction of the Court of Claims, were repealed by Section 297 of the Judicial Code.

The jurisdictional provisions with respect to the Court of Claims are now found in Section 145 of the Judicial Code (U. S. C., Title 28, Sec. 250).

Section 1069 of the Revised Statutes, requiring claims to be filed in the Court of Claims within six years, and Section 1072 of the Revised Statutes, prescribing the filing of a verified petition in the Court of Claims, were repealed by Section 297 of the Judicial Code and now appear without change in Sections 156 and 159 of the Judicial Code, respectively (U. S. C., Title 28, Secs. 262 and 265).

Section 2 of the Tucker Act, as amended, vesting in the district courts concurrent jurisdiction with the Court of Claims, was repealed by Section 297 of the Judicial Code, and is now found in U. S. C. Title 28, Section 41(20) (Judicial Code Section 24 (20) as amended), reading as follows:

"*Section* 41. (*Judicial Code, section* 24, *amended.*)

Original jurisdiction. The district courts shall have original jurisdiction as follows:

* * * * *

"(20) *Suits against United States.* Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court; and of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. Nothing in this paragraph shall be construed as giving to either the district courts or the Court of Claims jurisdiction to hear and de-

termine claims growing out of the Civil War, and commonly known as 'war claims,' or to hear and determine other claims which had been rejected or reported on adversely prior to the 3d day of March, 1887, by any court, department, or commission authorized to hear and determine the same, or to hear and determine claims for pensions; or as giving to the district courts jurisdiction of cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof; but no suit pending on the 27th day of June, 1898 shall abate or be affected by this provision. No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. The claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the suit be brought within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury."

Sections 5 and 6 of the Tucker Act appear without change in U. S. C. Title 28, Sections 762 and 763 respectively.

Section 3226 of the Revised Statutes, as amended and re-enacted by Section 1113(a) of the Revenue Act of 1926, c. 27, 44 Stat. 9:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been col ected without authority, or of any

sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."